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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1398

JOHN W. WARNER, SECRETARY OF THE NAVY,
PETITIONER

v.

JOHN W. FLEMINGS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 7-32) is reported at 458 F 2d. 544. The opinion of the district court (Pet. App. B 33-55) is reported at 330 F. Supp. 193.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on March 28, 1972. The petition for a writ of certiorari was filed on April 27, 1972; it was

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granted on June 19, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the holding of *O'Callahan* v. *Parker*, 395 U.S. 258, should be applied retroactively to invalidate a conviction that had become final long before the date of that decision.

2. Whether respondent's 1944 court-martial conviction for stealing an automobile while he was absent without leave from his naval unit in wartime was "service connected" within the test of *O'Callahan* v. *Parker*, 395 U.S. 258.

STATEMENT

Respondent, who was then a seaman second class in the United States Naval Reserve stationed at the Naval Ammunition Depot in New Jersey, failed on August 7, 1944, to return on time from an authorized three-day leave (App. 16–17, 53).[1] Approximately two weeks later, while absent without leave, he was apprehended by the state police in Pennsylvania in possession of an automobile which had been stolen two days earlier in Trenton, New Jersey (App. 4, 17, 31). Respondent was then returned to military authorities and confined for trial in New York. He was charged with unauthorized absence from his duty station during wartime for a period of thirteen days, and with theft of an automobile "from the posses-

[1] "App." references are to the appendix filed in this Court.

sion of a civilian"[2] while the United States was at war (App. 16–17).

A court-martial proceeding was convened at the Brooklyn Navy Yard, and in October 1944 respondent, who was represented by military counsel, entered pleas of guilty to both charges (App. 13–19).[3] He was sentenced to three years' incarceration, a reduction in rank to the position of apprentice seaman and dishonorable discharge (App. 20).[4] After two years' con-

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[2] Although the latter charge alleged that the automobile was stolen from a civilian, one Ernest Bush, it appears that Bush was in fact a member of the armed services at the time that the crime was committed (App. 50–51). But as the court below stated (Pet. App. 8): "The car was his personal property, he was on a purely personal errand in Trenton when the car was stolen, and at no time was he reimbursed by the military for any expenses incurred in the operation of the automobile."

[3] Respondent, who at the time of his apprehension was the sole occupant of the automobile, now apparently claims that he was merely a passenger in the vehicle and was unaware that it was stolen (App. 3–4).

[4] In 1944, prior to enactment of the Uniform Code of Military Justice, each service operated under separate statutes. The Articles for the Government of the Navy (AGN) applicable during this period were embodied in Title 34 of the United States Code, Section 1200. The offense of theft was punishable under Article 8, Paragraph 1, and the offense of absence from station or duty without leave, was punishable under Article 8, Paragraph 19. Permissible punishments for these offenses were provided by Presidential Order, set forth in NAVAL COURTS AND BOARDS (1937). The maximum punishment which could be imposed on an enlisted man for the offense of theft of property valued in excess of $100.00 was confinement for four years and a dishonorable discharge; the maximum punishment for the offense of absence without leave was six months' confinement, an additional period of confinement equal to the period of absence, and a bad-conduct discharge. See NAVAL COURTS AND BOARDS, § 457, at pp. 233 and 235.

finement at the United States Naval Prison, Portsmouth, New Hampshire, respondent was released and, on October 23, 1946, he was dishonorably discharged (App. 5, 31–32).

On June 2, 1969, this Court decided *O'Callahan* v. *Parker,* 395 U.S. 258, invalidating the court-martial conviction of a serviceman for a non-service-connected offense on the ground that he had been denied his constitutional rights to indictment by a grand jury and to trial by jury in a civilian court. In October 1970, respondent instituted the present suit in the United States District Court for the Eastern District of New York, relying on *O'Callahan* and seeking to compel the Secretary of the Navy to overturn his 1944 court-martial conviction for auto theft and to correct his military records with respect to the dishonorable discharge.[5] He did not challenge the validity of his conviction for being absent without leave.

On July 19, 1971, the district court held (Pet. App. B) that the offense of auto theft was not in these circumstances "service connected," and that *O'Callahan* must be applied retroactively to invalidate respondent's court-martial conviction on that charge. It remanded the case to the Board for Correction of Naval

[5] The action was stayed pending respondent's exhaustion of military remedies. Respondent's application for correction of his military records was denied by the Judge Advocate General of the Navy on May 20, 1971; this denial was based on decisions of the United States Court of Military Appeals which hold that *O'Callahan* should be given prospective application only (App. 60–63). The Board for Correction of Naval Records also denied relief on the ground that the Board lacks the authority to review court-martial convictions (App. 64–66).

Records with directions to change respondent's dishonorable discharge to "a discharge of no greater disapprobation than bad conduct" (Pet. App. 55).

The court of appeals affirmed (Pet. App. A). The court agreed with the district judge's analysis that, measured by the factors enumerated in *Relford* v. *Commandant,* 401 U.S. 355, 365, the auto theft was not "service connected." It also agreed that the apparent jurisdictional basis for the decision in *O'Callahan* required full retroactive application. The court of appeals stated further that, while it considered this Court's analysis of the possible retroactivity of "new rules of criminal procedure" to be irrelevant here, it would reach the same result under the "three-pronged interest balancing test" (Pet. App. 16) applied in other retroactivity cases,—*i.e.,* the purpose of the new rule, reliance by the government upon the law as it was before *O'Callahan,* and the practical impact of retroactivity (Pet. App. 23–30).

SUMMARY OF ARGUMENT

I

Whether *O'Callahan* v. *Parker,* 395 U.S. 258, should be given retroactive effect to upset countless court-martial convictions that have been rendered over many years under the mandate of Congress is, as this Court recently observed in *Relford* v. *Commandant,* 401 U.S. 355, 370, a "question [that] has important dimensions, both direct and collateral * * *." Despite the view of the court below, we urge that all of the other courts (both military and civilian) that have considered the issue have been correct in concluding that

the retroactivity question is not controlled simply by whether the *O'Callahan* decision can be characterized as "jurisdictional."

In *O'Callahan,* a divided Court held in essence that the normal court-martial authority over servicemen cannot be exercised to take away their Fifth and Sixth Amendment rights to indictment and trial by jury, if the circumstances of the offense do not make it "service connected." Whatever significance might attach to the "jurisdictional" language used in the opinion, the announcement of this new constitutional rule was decidedly "a clear break with the past" (*Desist* v. *United States,* 394 U.S. 244, 248). Under prior law, it was generally accepted that Congress had constitutionally given military tribunals the power to adjudicate all offenses committed by members of the armed forces; a constitutional construction to the contrary, whatever its implications for future adjudicatory power by courts-martial, does not eliminate the past practice as an operative fact that deserves considerable weight in determining how the new rule should apply. A mechanical understanding of "jurisdiction" as that term was used by the Court in *O'Callahan* is unjustified, since in some senses the servicemen in these now-contested cases were in fact, and under statute, subject to military discipline and control—or "jurisdiction."

In any event, the "jurisdictional" underpinnings of *O'Callahan* are no different from the constitutional principles established in *Duncan* v. *Louisiana,* 391 U.S. 145, and *Bloom* v. *Illinois,* 391 U.S. 194,

declaring state courts to be without power to adjudicate certain serious crimes unless the defendant is allowed a jury trial. Yet in *DeStefano* v. *Woods*, 392 U.S. 631, this Court did not view the retroactivity issue as foreclosed and instead determined that retroactive effect should be denied. So also, the "jurisdictional" terminology used in a related context in *O'Callahan* should not alone compel its retroactive application to invalidate past non-jury court-martial convictions involving "non-service-connected" crimes. Rather, as in *DeStefano*, the issue here must be resolved on the basis of the criteria that this Court has generally invoked in determining the temporal impact of the announcements of new constitutional doctrines in other cases: that is, the purpose of the new rule, reliance by the government upon the law as it was before *O'Callahan*, and the practical impact of retroactivity.

II

Analyzing the decision in this manner requires that *O'Callahan* be given only prospective effect for reasons closely similar to those that led to the decision in *DeStefano* that the imposition of jury trial requirements upon the States should not be retroactive.

a. In terms of the "purpose" criterion, it cannot be said that court-martial convictions without indictment and trial by jury have been inherently so unfair that no past conviction for a "non-service-connected" crime can stand. Although the two systems are not identical, we point out some of the procedural protections given the accused in the military judicial

system that are comparable to those in a civil trial, and others that are more favorable. Just as the values implemented by the right to trial by jury would not have been measurably served by a retroactive application of *Duncan* and *Bloom*, so too the values implemented by the jury (and grand jury) procedures that underlie *O'Callahan* will not measurably be served by giving that decision retrospective effect. The integrity of the fact-finding process is not substantially implicated.

b. The extent to which the military had relied upon pre-*O'Callahan* law as a basis for exercising jurisdiction also points sharply away from retroactivity. Courts-martial for "non-service-connected" crimes have gone on for many years with strong support from a previously unbroken line of decisions in this Court and with express authorization of decisions in the lower federal courts. Certainly when respondent was court-martialed in 1944, military officials had no reason to think that the crime of auto theft committed by a serviceman who was absent without leave during wartime was not subject to military punishment.

c. Moreover, retroactively overturning these earlier convictions would not only free hundreds of those properly found guilty of crimes after trials authorized by the law at the time, but could also generate a substantial amount of civil litigation for correction of military records, back pay and the like. Although the likely number of suits would be smaller, the volume of potential claims if *O'Callahan* is held retroactive may be a million or more. In many such cases it

would be extremely difficult, if not impossible, to reconstruct all of the facts from which "service connection" could be determined under the multi-factor test announced in *Relford,* to say nothing of the problems of marshalling the evidence that would be required for retrial in civilian courts.

Thus here, as in *DeStefano,* the relevant practical considerations require prospectivity and the purpose of the new rule announced in *O'Callahan* permits it, as the Court of Military Appeals and other lower federal courts have held.

III

Even if this were not the case, however, *O'Callahan* would not require an invalidation of respondent's 1944 court-martial conviction for the theft of an automobile while he was absent without leave during wartime, since that offense is "service connected" under the rationale of *Relford.*

Wartime court-martial jurisdiction has long been regarded as considerably broader than in peacetime. Indeed, historically the power of military tribunals to try members of the armed forces in time of war has, because of the increased need for discipline, been understood to be plenary, embracing all offenses. In the instant case, not only was the offense committed in wartime, but also during the period that respondent was absent without leave, a dereliction of duty over which the military clearly had jurisdiction. The theft of the car may properly be viewed as facilitating respondent's efforts to get away from the post and avoid apprehension by increasing his mobility; it thus

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could well be said to have been in furtherance of unlawfully remaining absent without leave. As such, the offense was of sufficient concern to the military authorities to support inclusion of that charge along with the AWOL charge in his court-martial.

ARGUMENT

At the end of the 1968 Term, this Court in *O'Callahan* v. *Parker*, 395 U.S. 258, divided sharply over the question whether a serviceman unquestionably subject to general military discipline can properly be subject to court-martial for the commission of crimes that are not "service connected." The negative response given by the majority in that case rendered unconstitutional in part the express statutory provisions of the Uniform Code of Military Justice making acts not necessarily service-connected punishable by court-martial, if committed by members of the armed forces. Those provisions of the Code have direct statutory antecedents going back to 1916 and, through the general article, back to the beginning of the Republic (see our Brief in *O'Callahan*, No. 646, O.T. 1968, at pp. 11–16, 20–24). We continue to believe that *O'Callahan* was wrongly decided. Of course, before the retroactivity question can be reached, the Court must first determine whether *O'Callahan* is to be followed.[6]

[6] In *Relford*, the Court found it unnecessary to decide the retroactivity question presented here, since it concluded that the offense was "service connected" (401 U.S. at 369).

I. REFERENCES TO A JURISDICTIONAL BASIS FOR THE DECISION IN *O'CALLAHAN* v. *PARKER* DO NOT ESTABLISH THAT RETROACTIVITY MUST BE ACCORDED AUTOMATICALLY.

If *O'Callahan* is to be followed, it is our position that it should not be given retroactive effect to upset countless court-martial convictions that have been rendered over many years under the mandate of Congress.

Unlike the other courts that have considered this issue,[7] the courts below regarded certain references to "jurisdiction" in the *O'Callahan* opinions as controlling. We dispute the approach that makes the substantial question of retroactivity *vel non* turn on the decisional technique of attaching a "jurisdictional" label to the *O'Callahan* decision and declaring void all past court-martial convictions involving non-service-connected crimes on the ground that the military tribunals "lacked adjudicatory power" (Pet. App. 18) to try the offenses. Rather, whatever the jurisdictional basis of *O'Callahan*—which, as pointed out by the district court below (Pet. App. 38–39), is itself

[7] See *Gosa* v. *Mayden*, 450 F. 2d 753 (C.A. 5), certiorari granted, No. 71-6314 (June 19, 1972); *Schlomann* v. *Moseley*, 457 F. 2d 1223 (C.A. 10), pending on petition for certiorari, No. 71-6879; *Thompson* v. *Parker*, 308 F. Supp. 904 (M.D. Pa.), appeal dismissed, C.A. 3, No. 18,868, decided April 24, 1970. And see *Mercer* v. *Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264.

a matter of some controversy[8]—we believe that the question whether that decision should be retroactively applied must be decided on the basis of the criteria that this Court has generally invoked in determining the temporal impact of the announcements of new constitutional doctrines in other cases. See, *e.g.*, *De-Stefano* v. *Woods*, 392 U.S. 631; *Stovall* v. *Denno*, 388 U.S. 293, 297; *Johnson* v. *New Jersey*, 384 U.S. 719; *Linkletter* v. *Walker*, 381 U.S. 618.

It has long been recognized that "the actual existence of the law prior to the determination of unconstitutionality 'is an operative fact and may have consequences which cannot justly be ignored.'" *Linkletter* v. *Walker*, 381 U.S. 618, 625, quoting *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374. As recently pointed out in *Williams* v. *United States*, 401 U.S. 646, 651, this Court in *Linkletter* "firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law," notwithstanding "prior constructions to the contrary * * *." Although perhaps conceptually more satisfying, it is simply not accurate to pretend that the new an-

[8] Compare the decision of the Second Circuit in this case (Pet. App. 17–22) with *United States* v. *King*, 40 C.M.R. 1030, 1035, where the Air Force Board of Review stated: "In our view, the Supreme Court [in *O'Callahan*] was speaking only in terms of placing a limitation on the *exercise* of jurisdiction—not in terms of its existence or nonexistence." And see *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 246, where this Court observed that the congressional regulation of land and naval forces "deals neither with power nor with jurisdiction, but with their exercise."

nouncement merely states what the law "always was." The hallmark of the Court's determination to recognize that constitutional doctrine evolves—and is not "discovered"—has been the candid willingness of the Court to leave undisturbed decisions rendered in conformity with prior constitutional pronouncements, unless substantial justice otherwise requires.

It therefore does not follow from the decision in *O'Callahan*—whether it be construed as holding that "the court-martial lacked power over the subject matter * * * before it" or be read as deciding that "denial of the right to a grand and petit jury without waiver caused potential jurisdiction to be lost * * *" (Pet. App. 38–39)—that military tribunals exercising jurisdiction over non-service-connected crimes prior to the date of the decision were without power to adjudicate. The radical change in the foundations of military justice announced in that decision was, in the most literal sense, "a clear break with the past" (*Desist* v. *United States,* 394 U.S. 244, 248). The fact that this marked departure from generally accepted principles of military jurisprudence was cast in jurisdictional terms should not, we submit, foreclose consideration under standard criteria as to how *O'Callahan* should apply to situations, such as presented here, where the court-martial conviction became final long ago.

An approach to the retroactivity question that turns on a mechanical application of the concept of "jurisdiction" is unnecessary and unwise. Several factors demonstrate why more reflective analysis of this im-

portant issue is in order. In the cases to which *O'Callahan* would be applied if the decision below is followed, the court-martial defendant, as a member of the armed forces, was unquestionably subject to general military discipline and military jurisdiction. It is important to keep in mind that, unlike in some precursors to *O'Callahan*, we are not dealing with attempts by military courts to usurp civil authority by subjecting civilians to trial before courts-martial.

In addition to jurisdiction over the person, which the courts-martial in these cases undeniably possessed, in a real sense they also had subject matter jurisdiction over the offenses, notwithstanding some of the language in *O'Callahan*. As a comparison of *O'Callahan* and *Relford* indicates, the military authorities were guided by the statutory framework of the Uniform Code of Military Justice (and its predecessors) in asserting the responsibility for disciplining members of the armed forces found guilty of engaging in substantive conduct proscribed by those Articles. The core conduct in those two cases in the substantive sense was quite similar—assault and sexual abuse. It seems to us unwarranted and ill-advised to be bound by notions of "jurisdiction" in deciding whether such convictions should be treated as "void" when the inquiry into "service-connection" depends on elusive and collateral factors not at the heart of the military's assertion or exercise of disciplinary responsibility for the soldier.

Further, as shown by the facts in the present case, not infrequently a course of conduct by the soldier may have led to several charges, preferred and tried

simultaneously, with one or more evidently "service connected" (being AWOL), and the other of debatable nexus (here, auto theft). Using nice concepts like "adjudicatory power" and "jurisdiction" to distinguish nearly thirty years after the fact which count a court-martial should have dealt with and which it should not does not advance the inquiry whether fundamental unfairness has been worked requiring judicial intervention. Thus, we believe the Court of Appeals for the Tenth Circuit was on the mark when it concluded: "the jurisdictional terminology does not dispense with the duty to decide whether 'the Court may in the interest of justice make the rule prospective * * * where the exigencies of the situation require such an application.' "[9]

This position conforms with the action taken by the Court in *De Stefano* v. *Woods, supra,* where it was determined on the basis of the "three-pronged interest balancing test" (Pet. App. 16) first enunciated in *Linkletter* and later followed in *Stovall* v. *Denno, supra,* 388 U.S. at 297, that the imposition of jury trial requirements upon the States, under *Duncan* v. *Louisiana,* 391 U.S. 145, and *Bloom* v. *Illinois,* 391 U.S. 194, should not be retroactive. The constitutional underpinning of *Duncan* and *Bloom* was much the same as in *O'Callahan:* state courts were in effect held to be without power to adjudicate without affording the accused in a serious criminal case the right to trial by jury. That the Court's opinion in *O'Callahan* used jurisdictional references should not obscure the

[9] *Schlomann* v. *Moseley, supra,* 457 F.2d at 1227, quoting *Johnson* v. *New Jersey,* 384 U.S. 719, 726–727.

fact that the same constitutional interests were at stake. The determination that States are required by *Duncan* and *Bloom* to try certain kinds of crimes in courts with juries rather than in other courts was no more a basis in *De Stefano* for automatic invalidation of past non-jury state trials than is the *O'Callahan* requirement that certain charges be tried in civilian rather than military courts a basis here for automatically invalidating past court-martial trials.[10]

Contrary to the view of the court below (Pet. App. 21–22), this Court's decision in *United States* v. *United States Coin and Currency,* 401 U.S. 715, applying *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, retroactively to forfeiture proceedings under 26 U.S.C. 7302, does not mandate automatic retroactivity of *O'Callahan.* Forfeiture in *Coin and Currency* had been predicated upon violations of 26 U.S.C. 4411, 4412 and 4901, statutes embodying requirements which this Court had held violative of the privilege against self-incrimination. Retrospective application was there believed compelled because "*Marchetti* and *Grosso* dealt with the kind of conduct that cannot constitutionally be punished in the first instance"; it was conduct "constitutionally immune from punishment,"

[10] Indeed, in cases that are jurisdictional in a more conventional sense, the courts have properly rejected arguments that retroactivity must inexorably follow. See *McSparran* v. *Weist,* 402 F.2d 867 (C.A. 3), certiorari denied, 395 U.S. 903 (federal courts held to be without diversity jurisdiction to hear child's damage claim where nonresident guardian of the minor is appointed solely to create diversity; given prospective effect only); *Lester* v. *McFaddon,* 415 F.2d 1101 (C.A. 4) (same).

and thus not properly subject to prosecution in any court (401 U.S. at 723–724). But a determination that the government in general is without power to prosecute and punish certain conduct is readily distinguishable from a requirement, such as imposed in *O'Callahan,* that certain charges, which are admittedly subject to prosecution, should be tried in one forum, where certain procedural protections are available, rather than in a different forum.

The essential thrust of *O'Callahan* is that, under circumstances not amounting to service-connection, the normal court-martial jurisdiction over servicemen cannot be exercised so as to take away their Fifth and Sixth Amendment rights to indictment and trial by jury. Whatever the "jurisdictional" implications of the decision, "the Constitution neither prohibits nor requires [that it be given] retrospective effect" (*Linkletter* v. *Walker, supra,* 381 U.S. at 629). Rather, the issue is simply—as in other retroactivity cases—whether a new trial right should be given to those already tried. As we have indicated, this issue is to be resolved by application of the same criteria that generally govern in cases of this sort.[11] Analyzing *O'Callahan* according to the traditional tests leads to the conclusion that the decision should properly be limited to prospective application only.

[11] The fact that *O'Callahan* was a habeas corpus proceeding, and thus, as here, presented the issue of the validity of a court-martial conviction on collateral attack, is not, as suggested by the court below, dispositive of the retroactivity question by virtue of "the very function of the writ" itself. The nature of the proceeding in which the new constitutional standard is

II. THE LIMITATIONS UPON TRIAL BY COURT-MARTIAL NEWLY ESTABLISHED IN *O'CALLAHAN* v. *PARKER* SHOULD NOT BE APPLIED RETROACTIVELY TO UPSET A CONVICTION THAT BECAME FINAL BEFORE THE DATE OF THAT DECISION.

We come, then, to what this Court stated in *Stovall* v. *Denno, supra,* 388 U.S. at 297, to be the pertinent considerations that affect the determination whether particular cases articulating new constitutional principles should be applied only prospectively:

> (a) the purpose to be served by the new principles; (b) the extent of the reliance by law enforcement authorities on the prior law; and (c) the effect on the administration of justice of a retroactive application of the new approach.

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announced has never been accorded special consideration in resolving how that standard should apply; whether the case is one on collateral attack or direct review is purely a matter of happenstance. Finally, even if, as suggested below, constitutional principles announced in habeas corpus procedings are of greater import than new constitutional standards enunciated in some other procedural context—which we doubt—it is well settled that "the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved" (*Johnson* v. *New Jersey*, 384 U.S. 719, 728).

As the Court stated in *Desist* v. *United States*, 394 U.S. 244, 254-255, n. 24: "* * * the fact that the parties involved in the decision are the only litigants so situated who received the benefit of the new rule is 'an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum.' Whatever inequity may arguably result from applying the new rule to those 'chance beneficiaries' is 'an insignificant cost for adherence to sound principles of decision-making.'" And see *Williams* v. *United States*, *supra*, 401 U.S. at 659.

a. *Purpose.* In evaluating the first, and "foremost" (*Desist* v. *United States, supra,* 394 U.S. at 249), of these criteria, it bears repeating at the outset that this Court held for the first time in *O'Callahan* that the exception to the guarantees of indictment and jury trial for "cases arising in the land or naval forces" refers only to those cases involving "service connected" offenses and not, as it had been generally believed, to all offenses by members of the armed forces. This narrow construction was adopted by a majority of the Court (395 U.S. at 272–273) "lest * * * [the Fifth Amendment exception relating to the military] be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers." With regard to the present question of retroactivity, our concern here is whether the "major purpose" for announcement of this new constitutional rule was "to overcome an aspect of the * * * [court-martial] trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials * * *" (*Williams* v. *United States, supra,* 401 U.S. at 653). We think not.

In *DeStefano* v. *Woods, supra,* involving essentially the same "constitutional stakes" (*O'Callahan* v. *Parker, supra,* 395 U.S. at 262) as here, *i.e.,* the right to trial by jury,[12] this Court observed in a similar con-

[12] *O'Callahan* also speaks of the right to indictment by grand jury. This, however, appears to be a less crucial factor since that provision of the Fifth Amendment has never been held binding upon the States. *Gaines* v. *Washington,* 277 U.S. 81, 86; *Hurtado* v. *California,* 110 U.S. 516.

text (392 U.S. at 633) "that the States must respect the right to jury trial because in the context of the institutions and practices by which we adopt and apply our criminal laws, the right to jury trial generally tends to prevent arbitrariness and repression." Even so, the argument for applying *Duncan* and *Bloom* retrospectively was, as we earlier stated, rejected in *DeStefano,* since it was determined that the states' failure to afford defendants this procedure in past criminal trials did not necessarily "[infect] the integrity of the truth-determining process" (*Stovall* v. *Denno, supra,* 388 U.S. at 298). See *Williams* v. *United States, supra,* 401 U.S. at 655–656, n. 7. The Court held in *DeStefano* (392 U.S. at 633–634), quoting *Duncan, supra,* 391 U.S. at 158:

> * * * "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." * * * The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial. * * *

This is the appropriate response to the argument for a retrospective application of *O'Callahan* in the present case. We disagree with the court below that this Court's basic concern in *O'Callahan* to give servicemen who commit non-service-connected crimes the right to jury trial in a civilian court should be taken as resting upon a determination that all court-martial

convictions are inherently unfair. Compare *Gosa* v. *Mayden, supra,* 450 F. 2d at 756, 764, 765; *Schlomann* v. *Moseley, supra,* 457 F. 2d at 1229; *Thompson* v. *Parker, supra,* 308 F. Supp. at 908.[13] If that were the case, due process would invalidate the court-martial system even in its application to clearly military crimes. Neither in *O'Callahan* nor in any other decision has the Court intimated any such pervasive distrust of the overall court-martial system.

The opinion of Mr. Justice Douglas, speaking for a majority of the Court, is, to be sure, critical of some of the aspects of the military judicial process which distinguish it from a civilian court system (395 U.S. at 263–266). But whether or not one agrees with that assessment—and we believe, along with several commentators,[14] that it is unduly harsh (see pp. 23–28, *infra*)—the fact remains, as pointed out by the Fifth Circuit in *Gosa* v. *Mayden, supra,* 450 F. 2d at 765:

> * * * that, demeaning of military justice as these remarks may be, the opinion does not formulate its new constitutional restriction on

[13] See also Nelson and Westbrook, *Court-Martial Jurisdiction Over Servicemen For "Civilian Offenses": An Analysis of O'Callahan v. Parker*, 54 Minn. L. Rev. 1, 42–43, 58–61 (1969).

[14] See, *e.g.*, Nelson and Westbrook, *supra*, 54 Minn. L. Rev. at 57–58, 61–63; Everett, *O'Callahan v. Parker, Milestone or Millstone in Military Justice*, 1969 Duke L. J. 853, 867–868, 889; Comment, *O'Callahan v. Parker, A Military Jurisdictional Dilemma*, 22 Baylor L. Rev. 64, 68–69 (1970); and see generally Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A. L. Rev. 1240 (1968); Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 188–189 (1962).

congressional power for the purpose of preventing or undoing the conviction of innocent men. There was no determination that the UCMJ carried a clear danger of convicting the innocent, nor was it adjudicated that Congress had ordained a truth-determining process which lacked integrity or which was infected with procedures which substantially impaired the truth-finding function.

Whatever doubts lingered in this regard after *O'Callahan* were, we think, laid to rest by the unanimous decision of this Court in *Relford* v. *Commandant, supra.* It was there argued that, for a crime to be "service connected" within the meaning of *O'Callahan,* it must "itself be military in nature, that is, one involving a level of conduct required only of servicemen and, because of the special needs of the military, one demanding military disciplinary action" (401 U.S. at 363). The Court, however, took a broader view of what crimes are properly triable by court-martial (401 U.S. at 364), and held that essentially "civilian offenses" (there, rape) could properly be tried by court-martial if committed by a serviceman in circumstances which, upon a balance of various factors enunciated in *Relford* (401 U.S. at 365–366), warranted the conclusion that the conduct or its impact is "service connected." In view of *Relford,* which like *O'Callahan* involved the crime of rape, we believe that the court below erred in construing *O'Callahan* as an expression by this Court of a lack of confidence

in the fundamental fairness of court-martial procedures. For if there were indeed reservations about the integrity of the military truth-determining process at trials of the sort involved in those cases, the limitation on court-martial jurisdiction would surely have been defined, as was unsuccessfully urged in *Relford,* in terms of crimes that were by nature purely military offenses.[15]

Moreover, the ostensible protective purpose of *O'Callahan*—assuring a jury trial in a local civilian court—does not invariably furnish the accused with an advantage, notwithstanding the premise of the holding. As the Court of Military Appeals pointed out in *Mercer* v. *Dillon, supra,* 19 U.S.C.M.A. at 266, 41 C.M.R at 266, there are "extensive statutory and judicial protections an accused in the armed forces enjoys," and frequently "the composition of a court-martial is for a member of the armed forces more nearly a jury of his peers than is a civilian panel in a State where the member may be involuntarily stationed."[16] Indeed, it is not difficult to visualize situations in which a soldier who is off his base and commits a crime against a local resident

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[15] As pointed out in *Gosa* v. *Mayden, supra,* 450 F. 2d at 765, the *Relford* decision apparently "extended the jurisdictional reach of military courts to about 80% of those servicemen who might otherwise have been excluded if a narrower definition of *O'Callahan* service connection had been adopted."

[16] See also Wilkinson, *The Narrowing Scope of Court-Martial Jurisdiction: O'Callahan* v. *Parker,* 9 Washburn L.J. 193, 207 (1970). The Court has recognized in a separate context the existence of the military as a "specialized community." *Orloff* v. *Willoughby,* 345 U.S. 83, 94.

will receive a more objective and sympathetic hearing from a court-martial than from a local jury. In addition, although a grand jury indictment is not utilized in military prosecutions, the serviceman is accorded special protections in the military analog, pretrial investigation under Article 32, 10 U.S.C. 832, that are not available in the grand jury process, including the right to counsel, to present exonerating evidence and to cross-examine witnesses. See *Mercer* v. *Dillon, supra,* 19 U.S.C.M.A. at 266, 41 C.M.R. at 266.[17]

Nor does the list of procedural safeguards end there. Indeed, as was noted more than twenty years ago by the Court of Military Appeals in *United States* v. *Clay,* 1 U.S.C.M.A. 74, 77–78, 1 C.M.R. 74, military due process, although of judicial and legislative derivation, guarantees to servicemen rights that essentially parallel those available to civilian defendants being tried by the civilian courts. And see *United States* v. *Jacoby,* 11 U.S.C.M.A. 428, 430–431, 29 C.M.R. 244. Thus, members of the armed forces who

[17] Under Article 32, the investigating officer is required to call all available witnesses and to conduct a thorough and impartial investigation. See *Manual for Courts-Martial, United States,* Sec. 34(a) (1951). The failure to comply with Article 32 is ground for reversal. See *United States* v. *Nichols,* 8 U.S.C.M.A. 119, 23 C.M.R. 343.

By comparison, the grand jury may indict without notifying a potential defendant of the investigation and without affording him an opportunity to call witnesses in his behalf. Moreover, even if called, he is not permitted to be accompanied into the grand jury room by counsel. See Rule 6, Fed. R. Crim. P. In many states, the prosecution may by-pass the grand jury process altogether and proceed by way of information.

are subject to court-martial are entitled, as was pointed out in *Clay, supra,* to be informed of the charges against them, to confront witnesses,[18] to be represented by counsel, to invoke the privilege against self-incrimination, and to have involuntary confessions excluded. In addition, the rights to a speedy (*United States* v. *Hounshell,* 7 U.S.C.M.A. 3, 21 C.M.R. 129),[19] and public (*United States* v. *Brown,* 7 U.S.C.M.A. 251, 257, 22 C.M.R. 41) trial have been recognized as fundamental to military due process.[20] Further, in *United States* v. *Doyle,* 1 U.S.C.M.A. 545, 547, 4 C.M.R 137, it was pointed out that the exclusionary rule announced by this Court in *Weeks* v. *United States,* 232 U.S. 383, had been followed by the armed services even before the Uniform Code of Military Justice was adopted.[21] And, more recently,

[18] See *United States* v. *Sweeney,* 14 U.S.C.M.A. 599, 602, 34 C.M.R. 379 (reversal of conviction where the accused's motion for the appearance of a material witness in his behalf had been denied); *United States* v. *Thornton,* 8 U.S.C.M.A. 446, 24 C.M.R. 256 (conviction reversed due to prejudicial error in failing to secure by subpoena live testimony of a material defense witness).

[19] And see *United States* v. *Schalck,* 14 U.S.C.M.A. 371, 373–375, 34 C.M.R. 151, holding that a defendant who entered a plea of guilty and failed at trial to assert that he had been denied a speedy trial had not waived his right to make such a claim.

[20] Although unanimity is not required for a court-martial verdict, this Court has held that a less-than-unanimity procedure satisfies due process requirements. *Johnson* v. *Louisiana,* No. 69–5035, decided May 22, 1972.

[21] See also *United States* v. *Vierra,* 14 U.S.C.M.A. 48, 52–54, 33 C.M.R. 260, where a conviction was reversed because evidence was introduced which had been seized in violation of the "mere evidence" rule.

the Court of Military Appeals has held that the requirements of *Miranda* v. *Arizona*, 384 U.S. 436, are equally applicable to the military. See *United States* v. *Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249.[22]

These and other substantial protections given accused servicemen have generally dispelled any notion that courts-martial are inherently unfair.[23] Indeed, it has been pointed out that there now seems to be "universal recognition of the U.C.M.J. as the most enlightened military code in history and as [one] affording the basic elements of fairness." *United States ex rel. Guagliardo* v. *McElroy*, 259 F. 2d 927, 940, n. 29 (C.A.D.C.) (Judge (now Chief Justice) Burger, dissenting).

In those instances where a claim of procedural irregularity has been raised, the Court of Military Appeals, composed of civilian judges who sit for a term of fifteen years (Art. 67, 10 U.S.C. 867), has consistently and fairly reviewed the court-martial conviction for constitutional and other error; like civilian courts, it is wholly free of the possibilities of command influence that underlie many attacks on mili-

[22] Nelson and Westbrook, *supra*, 54 Minn. L. Rev. at 60, point out that the impact of *Miranda* upon the military has been less marked than on the civilian law enforcement agencies, since the military had theretofore followed the practice of advising an accused of his right to remain silent.

[23] For a discussion of additional procedural protections accorded to accused servicemen, see Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 Harv. L. Rev. 266, 278, 284, 294–296, 300–301 (1958); Comment, *Courts-Martial Jurisdiction—Service-Connected Crime*, 21 S.C. L. Rev. 781, 787–789 (1969); Warren, *supra*, 37 N.Y.U. L. Rev. at 188–189; Quinn, *supra*, 15 U.C.L.A. L. Rev. at 1242–1243.

tary justice. Its "delicate perceptions," it has been said, "have sniffed out fatal denials of due process in situations in which their presence would probably not have been noticed by most civilian judges." Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions,* 61 Colum. L. Rev. 40, 57, n. 87 (1961).[24] And, of course, review is ultimately available in the federal courts on habeas corpus to determine that the military tribunals have given fair consideration to a convicted serviceman's basic rights. See, *e.g., Burns* v. *Wilson,* 346 U.S. 137; compare *United States* v. *Augenblick,* 393 U.S. 348.

In light of these extensive procedural safeguards embedded in the military system of justice, we do not believe that it can fairly be said that the lack of indictment and jury trial in past courts-martial for "non-service-connected" crimes "presents substantial likelihood that the results of a number of those trials were factually incorrect" (*Williams* v. *United States, supra,* 401 U.S. at 655, n. 7) Just as in *DeStefano,* "[t]he values implemented by" those Fifth and Sixth Amendment rights "would not measurably be served" (392 U.S. at 634), we submit, by applying the new *O'Callahan* rule retroactively to old convictions.

Although the present case antedates enactment of the Uniform Code of Military Justice in 1950,[25] this factor does not call for retroactivity of the *O'Calla-*

[24] See also Warren, *supra,* 37 N.Y.U. L. Rev. at 189.

[25] Following World War II, Congress extensively revised the Articles of War (62 Stat. 627) and by the Act of May 5, 1950, ch. 169, 64 Stat. 107, created the Uniform Code of Military Justice.

han rule. The new Code was designed "to reform and modernize the [military judicial] system—from top to bottom" *Burns* v. *Wilson,* 346 U.S. 137, 141. But even accepting, as we must, that under the earlier statutory procedures "less emphasis" was given to "protecting the rights of the individual than in civilian society and in civilian courts" (*Reid* v. *Covert,* 354 U.S. 1, 36), that in our view is not reason to condemn all court-martial convictions prior to 1950 dealing with non-service-connected crimes as inherently unfair because tried without benefit of grand and petit juries. In *Burns,* which involved a court-martial under the former Articles of War, Chief Justice Vinson's opinion concluded that there was no "fundamental unfairness in the process whereby [petitioners'] guilt was determined and their death sentences rendered" (346 U.S. at 142).

This Court observed in *Williams* v. *United States, supra,* 401 U.S. at 655, n. 7, quoting *Stovall* v. *Denno, supra,* 388 U.S. at 298, that "[t]he extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.'" "Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have,"[26] we think unwarranted the assumption indulged by the court below (Pet. App. 27) that the absence of the rights discussed in *O'Callahan* in this and other pre-Code court-martial proceedings raises a "clear dan-

[26] *Reid* v. *Covert, supra,* 354 U.S. at 36; and see *United States ex rel. Toth* v. *Quarles,* 350 U.S. 11, 17.

ger of convicting the innocent" (*Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 416).[27]

In sum, whether the new constitutional rule announced in *O'Callahan* is considered in the context of the present 1944 court-martial conviction or in the context of the military trials involved in *Gosa*, *Schlomann* and *Thompson* (all post-Code court-martial convictions), its "purpose" is adequately served by prospective application only. Whatever "marginal doubts" might exist "as to the accuracy of the results of past trials" (*Mackey* v. *United States*, 401 U.S. 667, 675), a backward look at the military judicial system without grand and petit juries does not permit the conclusion that the "newly proscribed practice has probably produced factually improper results in cases where it [has been] employed" (*Williams* v. *United States, supra*, 401 U.S. at 656, n. 7). To the contrary, it seems generally recognized that especially in the last twenty years servicemen have in fact received "many procedural rights which are even more conducive to fact accuracy than most civilian forums accord" (*Gosa* v. *Mayden, supra*, 450 F. 2d at 765).[28]

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[27] Here, as we earlier stated, the court-martial conviction resulted from a plea of guilty rather than from a trial, a fact which should not be wholly discounted. Cf. *McMann* v. *Richardson*, 397 U.S. 759, 773–774.

[28] The "purpose" factor in this case thus offers much more support for a prospective application of *O'Callahan* than in other areas where this Court has in the past denied retroactivity. Compare *Desist* v. *United States*, 394 U.S. at 249–250, n. 14, where the Court noted in making a similar point: "Cf. *Stovall* v. *Denno*, 388 U.S. 293, 298, where it was conceded that 'the *Wade* and *Gilbert* rules also are aimed at

b. *Reliance.* The second *Stovall* criterion focuses on the extent of reliance by the military upon the law as it was before *O'Callahan* and this factor too calls for non-retroactivity.

Military trial of servicemen for "non-service-connected" crimes (as that term is used in *O'Callahan* and *Relford*) was for many years the established practice. It proceeded not only on an assumption of legitimacy but was reinforced over the years by numerous statements by this Court indicating that the military status of the accused was an adequate predicate for military trial. As it had been expressed in *Kinsella* v. *Singleton, supra,* 361 U.S. at 243, "military jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense."

Just as the "States undoubtedly relied in good faith upon the past opinions of this Court to the effect that the Sixth Amendment right to jury trial was not applicable to the States" (*DeStefano* v. *Woods, supra,* 392 U.S. at 634), so also the military authorities and Congress had relied upon the previously unquestioned constitutionality of those provisions of

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avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence'; *Johnson* v. *New Jersey*, 384 U.S. 719, 730, where it was recognized that '*Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation'; and *Tehan* v. *Shott*, 382 U.S. 406, 414, where it was stated that 'the "purpose" of the *Griffin* rule is to be found in the whole complex of values that the privilege against self-incrimination itself represents,' including 'our realization that the privilege, while sometimes "a shelter to the guilty", is often "a protection to the innocent."' *Id.*, at 414–415, n. 12."

the Uniform Code of Military Justice, and its statutory antecedents (see p. 10, *supra*), that authorized courts-martial for non-service-connected crimes committed by servicemen. Although the opinion in *O'Callahan* contains an implicit disclaimer that it was overruling any specific prior decisions (395 U.S. at 267; but see Harlan, J., dissenting, at 275–276),[29] it remains the fact that since at least 1916 military authorities pursuant to acts of Congress asserted and exercised court-martial jurisdiction over all crimes by servicemen, and there was no indication in this Court's pre-*O'Callahan* opinions that they were wrong in doing so. To the contrary, those opinions certainly supported a reasonable inference that military status by itself was enough to permit court-martial. See, *e.g.*, *Ex parte Milligan*, 4 Wall. 2, 123; *Coleman* v. *Tennessee*, 97 U.S. 509; *Smith* v. *Whitney*, 116 U.S. 167, 184–185; *Johnson* v. *Sayre*, 158 U.S. 109, 114; *Grafton* v. *United States*, 206 U.S. 333, 348; *Reid* v. *Covert*, *supra*, 354 U.S. at 22–23; *Kinsella* v. *Singleton*, *supra*, 361 U.S. at 240–243.[30]

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[29] A decision of non-retroactivity is not conditioned upon the overruling of an earlier decision in announcing a "new" rule. The Court has stated that the *Stovall* standards apply to "the judgment whether a case *reversing prior doctrines* in the area of criminal law should be applied only prospectively." *DeStefano* v. *Woods*, *supra*, 392 U.S. at 633 (emphasis added). A reversal of "prior doctrines" may occur (as we contend it did here) irrespective of whether any specific case was overruled. See, *e.g.*, *Johnson* v. *New Jersey*, *supra*.

[30] See also our Brief in *O'Callahan* at 8–16, 20–25. The conclusion of the court below (Pet. App. 28–29 n. 23) that *O'Callahan* was but "a marked extension of a discernible trend" is based on this Court's decisions in *United States ex rel. Toth* v.

The lower federal courts that had squarely faced the *O'Callahan* contention, moreover, had in the past uniformly rejected it. *E.g., Burns* v. *Taylor,* 274 F. 2d 141 (C.A. 10), certiorari denied, 364 U.S. 837; *Owens* v. *Markley,* 289 F. 2d 751 (C.A. 7); *Thompson* v. *Willingham,* 318 F. 2d 657 (C.A. 3); *Wright* v. *Markley,* 351 F. 2d 592 (C.A. 7); *O'Callahan* v. *Chief United States Marshal,* 293 F. Supp. 441 (D. Mass). The closest judicial observer of the scene, the Court of Military Appeals, was thus led to conclude (*Mercer* v. *Dillon, supra,* 19 U.S.C.M.A. at 266–267, 41 C.M.R. at 266–267):

> The result in *O'Callahan* had not been foreshadowed in other opinions. Before *O'Callahan* the armed forces had absolutely no hint that such considerations as the nature, time, and place of the offense might limit trials by courts-martial. * * * [31]

Certainly, when respondent was court-martialed in 1944, military officials had no reason to think that the crime of auto theft committed by a serviceman who was absent without leave during wartime was not subject to military trial and discipline.

Quarles, supra (discharged servicemen cannot be court-martialed), *Reid* v. *Covert, supra* (civilian employees of military personnel accompanying them overseas cannot be court-martialed), and *McElroy* v. *United States ex rel. Guagliardo,* 361 U.S. 281 (civilian employees of Armed Forces overseas not subject to court-martial). But those decisions all rested on the traditional notion that military jurisdiction is based on the "status" of the accused, and thus, if anything, foreshadowed the opposite result in *O'Callahan.* See Mr. Justice Harlan's dissent in *O'Callahan,* 395 U.S. at 278–280.

[31] Accord, *Gosa* v. *Mayden, supra,* 450 F.2d at 765–766; *Schlomann* v. *Moseley, supra,* 457 F. 2d at 1230; *Thompson* v.

O'Callahan was, in short, at least as clear a "break with the past" (*Desist* v. *United States, supra,* 394 U.S. at 248) as this Court's decision in *Katz* v. *United States,* 389 U.S. 347. It was not anticipated; nor do we perceive any reason why it should have been. The law as it stood before *O'Callahan* was decided was understandably thought to be controlling. Thus the reliance factor as well strongly favors prospectivity.

c. *Effect.* Closely tied to the issue of reliance is the third relevant inquiry: the disruptive "effect on the administration of justice" that could well result from a retroactive application of *O'Callahan.* This factor too points away from retroactivity.

When the ruling in *O'Callahan* was rendered, the Army Judge Advocate General stated that since 1951 (following passage of the U.C.M.J.) the Army alone had court-martialed approximately 1.3 million men; he estimated that there were some 450,000 court-martial convictions which might be attacked under

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Parker, supra, 308 F. Supp. at 908. See also Nelson and Westbrook, *supra,* 54 Minn. L. Rev. at 43.

The sole portent of the result reached in *O'Callahan* was an article published in 1960 by Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction,* 13 Vand. L. Rev. 435. The authors based their view on a theory of the "necessary and proper" clause of the Constitution which this Court had rejected in *Reid* v. *Covert, supra,* and which *O'Callahan* did not purport to revive. The thrust of the article was that the necessary and proper clause was a substantive limitation on the grant of power to Congress in Article I, Section 8, Clause 14 of the Constitution to "make Rules for the Government and Regulation of the land and naval Forces," and that only such civilian offenses as had a military connection could appropriately be deemed "necessary and proper" to court-martial jurisdiction.

the new constitutional rule.[32] He further stated that approximately 4,000 men in the combined services were then in prison, and that many more might well seek relief under *O'Callahan* in suits challenging other punishments or involving back pay, veterans' benefits, and other collateral matters.[33] The Court of Military Appeals observed in *Mercer* v. *Dillon, supra*, 19 U.S.C.M.A. at 268, 41 C.M.R. at 268:

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[32] The Army estimates that between 1940 and 1950 there were approximately 1.2 million men court-martialed; during the same period, the Navy and Marine Corps estimate that they together convicted approximately 1.1 million men by court-martial. While it is unknown how many of these 2.3 million pre-Code convictions were for non-service-connected crimes (as defined in *Relford*), even the smallest percentage could result in a monumental case-load if *O'Callahan* is given retroactive effect.

[33] See Nelson and Westbrook, *supra*, 54 Minn. L. Rev. at 39–40; and see *Gallagher* v. *United States*, 423 F.2d 1371 (Ct. Cl.), certiorari denied, 400 U.S. 849.

Since these estimates were made prior to this Court's decision in *Relford*, they may now be excessive (see n. 15, *supra*). Moreover, it should be noted that many back-pay claims, and the like, may be foreclosed by the six-year statute of limitations on actions in the Court of Claims. See 28 U.S.C. 2501. In *O'Callahan* v. *United States*, 451 F.2d 1390 (Ct. Cl.), for example, plaintiff's claim for back pay from the date of unlawful discharge (1961) was barred by the statute of limitations. See also, with respect to suits for back pay, *United States* v. *Augenblick*, 393 U.S. 348; *United States* v. *Brown*, 206 U.S. 240; *Swaim* v. *United States*, 165 U.S. 553. And see *Dynes* v. *Hoover*, 20 How. 65, and *Wise* v. *Withers*, 3 Cranch 330, regarding possible damage actions for "illegal" court-martial proceedings. Even taking these considerations into account, however, there still remain a considerable number of court-martial convictions since 1916 that could be brought within the rationale of *O'Callahan*, as modified by *Relford*.

> For the one fiscal year of 1968, the Army, the Navy, and the Air Force conducted approximately 74,000 special and general courts-martial. If only the smallest fraction of these courts-martial and those conducted in the other years since 1916 involved an *O'Callahan* issue, it is an understatement that thousands of courts-martial would still be subject to review. The range of relief could be extensive, involving such actions as determinations by the military departments of whether the character of discharges must be changed, and consideration of retroactive entitlement to pay, retired pay, pensions, compensation, and other veterans' benefits. * * *

The court below dismisses this potential administrative and judicial burden by pointing to the paucity of cases in the civilian and military courts in recent years seeking relief under *O'Callahan*. See Blumenfeld, *Retroactivity After O'Callahan: An Analytical and Statistical Approach*, 60 Geo. L. J. 551, 578–581 (1972). But the fact that the announcement of the new constitutional rule has yet to spawn substantial litigation is hardly an answer. For until the court of appeals' decision in the present case in March of this year, both the military (*Mercer* v. *Dillon, supra*) and civilian (*Gosa, Schlomann,* and *Thompson*) courts had ruled against applying *O'Callahan* retroactively. Faced with such dim prospects of ultimate success, it is doubtful that many servicemen earlier convicted of non-service-connected crimes were willing to undergo the expense and strain of litigation that a court challenge under *O'Callahan*

would necessarily entail. That reluctance might well disappear, however, if this Court should decide, contrary to our submission, that *O'Callahan* must be given retroactive effect.

In *DeStefano* v. *Woods*, *supra*, 392 U.S. at 634, the Court attached great weight to the fact that:

> the effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases in those States not until now accepting the Sixth Amendment guarantee.

Precisely the same kind of problem is presented for both military and civilian authorities by the prospect that thousands of past court-martial convictions would be upset by retroactive application of *O'Callahan*. This in itself strongly favors prospectivity.

Nor is the sole concern in this regard with the number of retroactive claims. Also to be considered are the difficulties which are likely to arise in attempting to reconstruct events many years after the crime has been committed. See, *e.g.*, *Adams* v. *Illinois*, 405 U.S. 278, 284; *Williams* v. *United States*, *supra*, 401 U.S. at 654; *Desist* v. *United States*, *supra*, 394 U.S. at 251–252; *Linkletter* v. *Walker*, *supra*, 381 U.S. at 637–638. These practical problems are likely to frustrate any attempt at retrial in a different forum.

There is still a different kind of practical burden that retroactive effect would have, and that is ascertaining whether the charge itself was "service connected." What we would be faced with is not a determination like the relatively clear-cut decision whether

a newly announced constitutional rule retroactively vitiates an earlier conviction because the record shows the admission of a co-defendant's confession (*Roberts* v. *Russell,* 392 U.S. 293), or the denial of counsel (*Arsenault* v. *Massachusetts,* 393 U.S. 5). In the *O'Callahan* type of setting there are likely to be many instances in which the elements of service-connection cannot be determined from a stale record or even from a *de novo* hearing, since a number of the factors pertinent to this special inquiry do not appear in a normal court-martial record and may not now be recapturable. And, as Nelson and Westbrook, *supra,* point out, "the rapid turnover in military personnel and the fact that military people are transferred frequently renders the gathering of witnesses and evidence even more difficult than the already formidable task faced in this regard by civil courts." 54 Minn. L. Rev. at 44.

It seems pertinent to note here as well that the process of making a *nunc pro tunc* determination of "service connection," while simplified as to one class of cases by the intervening decision in *Relford,* has perhaps been complicated for the rest by the enumeration of a dozen different factors bearing on this question (401 U.S. at 365). The possible permutations of pro-and-con combinations are almost endless, and, even after the relevant factors and the direction in which they point are identified, there will remain the debatable—and appealable—determination whether on balance the offense was "service connected." As the opinions of the courts below illustrate, totalling up the pro factors and comparing them with the con factors

in order to make the "service connection" judgment many years after the trial appears unduly cumbersome and not necessarily accurate.

Moreover, even the possibility that the number of convictions actually challenged might turn out to be fewer than seems likely should not materially discount the significance of the impact of a holding of retroactivity, since the "purpose" and "reliance" factors, as we have shown, so strongly counsel against imposing the burden. See *Desist* v. *United States, supra,* 394 U.S. at 251–252. For the foregoing reasons, we submit that the decision in *O'Callahan* should be given prospective operation only.[34]

[34] While the question is not squarely presented in either this case or *Gosa*, there is the matter of where the cut-off point lies if we are correct in our position that *O'Callahan* should be prospective only. As a constitutional matter, we would urge that *O'Callahan* should apply only to cases where the actual court-martial trial began after the decision date, June 2, 1969, making no distinction between cases pending on appellate review and those where the appellate processes had been exhausted. Such a rule would be consistent with this Court's recent retroactivity opinions, which have rejected any such distinction as philosophically untenable, opting in favor of either full retroactivity or full prospectivity. *E.g.*, *Williams* v. *United States*, *supra*, 401 U.S. at 656-659; *Desist* v. *United States*, *supra*, 394 U.S. at 252-253; *DeStefano* v. *Woods*, *supra*, 392 U.S. at 635, n. 2; *Stovall* v. *Denno*, *supra*, 388 U.S. at 300–301.

The Court of Military Appeals has, however, taken a different approach, applying *O'Callahan* to cases that were still subject to appellate review within the military system on June 2, 1969. *E.g.*, *United States* v. *Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 259; see *Mercer* v. *Dillon*, *supra*, 19 U.S.C.M.A. at 265, 41 C.M.R. at 265. Since the Court of Military Appeals has articulated no constitutional rationale for this limited retroactive application, it must be deemed to be an exercise of its special

III. RESPONDENT'S THEFT OF AN AUTOMOBILE WHILE ABSENT WITHOUT LEAVE FROM HIS NAVAL UNIT IN WARTIME WAS "SERVICE CONNECTED"

Because the question of whether *O'Callahan* should be applied retroactively is also before the Court in *Gosa* v. *Mayden, supra,* involving a court-martial conviction for a crime that is concededly non-service-connected,[35] we deemed it appropriate here to address the issue of retroactivity first. But we do not concede that this case involves a non-service-connected offense within the meaning of *O'Callahan;* in our view it does not. We now turn to our contention that the crime of auto theft, when committed by a serviceman during wartime while he is absent without leave, is "service connected" within the meaning of *O'Callahan.*

In *Relford* v. *Commandant, supra,* which analyzed in some depth the *O'Callahan* service-connection test, this Court indicated in factor No. 5 that peacetime jurisdiction of courts-martial might properly be regarded as more limited than that obtaining in time of war (401 U.S. at 365).[36] Additionally, it was there

supervisory power over the administration of military justice. Accordingly, it is not necessary for this Court to consider the problem of convictions still in the military appellate process when *O'Callahan* was decided.

[35] And see *Schlomann* v. *Moseley, supra,* presently pending on petition for certiorari, No. 71-6879, also involving an admittedly non-service-connected offense.

[36] This Court implied in related contexts that the existence of a state of war is a factor to be considered in determining the extent of court-martial jurisdiction. See *Kinsella* v. *Singleton, supra,* 361 U.S. at 236; *Grisham* v. *Hagan,* 361 U.S. 278; *McElroy* v. *Guagliardo, supra; Reid* v. *Covert, supra,* 354 U.S. at 33.

suggested in factor No. 1 that an improper absence from base at the time of the offense would militate in favor of exercising court-martial jurisdiction. See also *O'Callahan* v. *Parker, supra,* 395 U.S. at 273-274. These two factors—*i.e.,* a declared war[37] and an unauthorized absence—are present in this case.[38]

The first of these, *i.e.,* that we deal here with a wartime rather than peacetime offense, is in our view entitled to considerable weight under the *"ad hoc* ap-

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[37] Respondent's offense was committed during World War II, prior to any events arguably indicating a cessation of hostilities. Thus, the question of what constitutes "in time of war" is not presented by this case. See Note, *Military Law—"In Time of War" Under the Uniform Code of Military Justice: An Elusive Standard*, 67 Mich. L. Rev. 841 (1969). See also *United States* v. *Anderson*, 17 U.S.C.M.A. 588, 38 C.M.R. 386; *United States* v. *Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363.

[38] The court below asserted that these were the only two factors of the twelve listed in *Relford* that favored court-martial jurisdiction. We do not believe, however, that the "service connection" determination was to be made solely on a numerical basis, without giving due consideration to the relative importance or unimportance of each factor listed in *Relford.* In this regard, we would point out that because respondent's absence was not "proper" under the first factor, it would seem to follow that several other factors that might have pointed in the direction of non-service-connection had the absence been "proper" carry less weight: *i.e.,* the crime's commission "away from the base" (No. 2) and "at a place not under military control" (No. 3); the "absence of any connection between the defendant's military duties and the crime" (No. 6); and the "absence of any threat to a military property" (No. 11). Moreover, in view of the unauthorized absence, it is questionable whether it can be said here that there was an "absence of any flouting of military authority" (No. 9) (see p. 47, *infra*). And, because the crime was committed in time of war, it is not clear, as we show *infra,* pp. 44–45, that there was an "absence of any threat to the military post" (No. 10).

proach" that this Court used in *Relford* (401 U.S. at 366). Military tribunals both in this country and in England have throughout history exercised broad jurisdictional powers over servicemen for offenses (both military and civil) committed in time of war.[39] Throughout the Seventeenth Century struggle between the English Crown and Parliament over the Crown's expansion of court-martial jurisdiction during time of peace (see *Reid* v. *Covert, supra,* 354 U.S. at 24–26),[40] the jurisdiction of the military in wartime to try "soldiers or mariners" for the crimes of "murder, robbery, felony, mutiny, or other outrage or misdemeanor whatsoever" (Petition of Right, 1627, 3 Car. 1, c. 1) was not questioned.[41]

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[39] See Winthrop, *Military Law and Precedents*, 18–19, 903–904 (1920 War Dept. Reprint); Duke and Vogel, *supra*, 13 Vand. L. Rev. at 441–443.

Military tribunals were introduced into England by William the Conqueror and his immediate predecessors during the latter part of the Eleventh Century. See Davis, *A Treatise on the Military Law of the United States* 13 (3d ed. 1913).

[40] See Winthrop, *supra* at 19–20; Duke and Vogel, *supra*, 13 Vand. L. Rev. at 443. And see our Brief in *O'Callahan* at 16–19.

[41] Parliament protested vigorously in its Petition of Right the policy of Charles I whereby military law was to be enforced against servicemen committing the above crimes in time of peace "by such summary course and order * * * as is used in armies in time of war * * *." See *Reid* v. *Covert*, *supra*, 354 U.S. at 25. In 1688, James II issued articles of war for the governance of the standing army in time of peace, which included punishment for the non-military crimes of murder, robbery and theft. Articles of War of James II, Arts. XVII–XVIII, reprinted in Winthrop, *supra*, App. V, at 922. Parliament responded again—the Bill of Rights of 1689—which provided that standing armies in peacetime were unlawful without the consent of Parliament, and almost immediately thereafter consolidated its control with the first Mutiny Act, 1 W. & M., c. 4

Similarly, military practice in this country at the time of the ratification of the Constitution—which, as noted in *O'Callahan* (395 U.S. at 270), was largely reflective of the then prevailing British practice—indicates a general understanding that court-martial jurisdiction in time of war extended to the trial of soldiers for both military and non-military offenses. An examination of court-martial cases actually tried during the period reveals numerous instances of court-martial trials of servicemen for so-called "civilian" offenses. In an Appendix (pp. 49–56, *infra*) we are listing a number of these, including the crimes of simple assault of a civilian, drunkness, rioting in town, fraud, and cashing a bad check in a civilian restaurant. Among the more serious offenses can be found housebreaking, theft (as charged in the instant case) and robbery.[42]

In 1863, during the Civil War, Congress for the first time made specific provision in the Articles of

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(reprinted in Winthrop, *supra*, App. VI, at 929), providing for court-martial of soldiers in time of peace, but specifically restricting the jurisdiction to the offenses of mutiny, sedition and desertion. Significantly, however, Parliament imposed no limitation then or later (see our Brief in *O'Callahan* at pp. 18–19) on the offenses triable by court-martial in time of war. See Duke and Vogel, *supra*, 13 Vand. L. Rev. at 444; Davis, *supra*, at 3.

[42] This Appendix contains a partial list of the offenses we summarized in the Appendix to our Brief in *O'Callahan*. The majority's opinion in *O'Callahan* distinguished the court-martial convictions in these Revolutionary War cases on the ground that "those courts-martial held between 1773 and 1783 were for the trial of *acts committed in wartime* and, given the pattern of fighting in those days, in the immediate theater of operations" (395 U.S. at 270, n. 14; emphasis added).

War for the trials of non-military crimes during wartime.[43] The provision, contained within an enactment for the enrolling and calling out of national forces, was as follows (Act of March 3, 1863, ch. 75, § 30, 12 Stat. 731, 736):

> That in time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishments for such offenses shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed.

Except for minor changes in 1874, removing the duty to surrender soldiers to civil authorities in time of war (Rev. Stat. 1342, Art. 59), the pertinent Articles were not further revised until 1916. At that time,

[43] Until then the general article (1775 Articles of War, set forth in Winthrop, *supra*, at 957) had been considered to provide the Army with an adequate basis for the exercise of such non-military criminal jurisdiction during wartime as might be necessary for the regulation of its small force. The Navy's authority in this regard derived from the Articles for the Better Government of the Navy (Act of April 23, 1800, ch. 33, 2 Stat. 45), which conferred jurisdiction over all naval personnel "while on shore" (2 Stat. 47, Art. XVII) and at sea (2 Stat. 48, Arts. XXI, XXIV, XXVI). See Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1, 13–15 (1958).

Congress for the first time made specific provision for peacetime court-martial jurisdiction over various enumerated non-capital offenses committed by members of the armed forces (39 Stat. 664, Arts. 92 and 93); the existing jurisdiction of military tribunals during wartime, however, was in no way curtailed (see our Brief in *O'Callahan* at pp. 21–23).

The provisions of the 1916 articles relating to jurisdiction over non-military offenses remained essentially the same until the enactment in 1950 of the Uniform Code of Military Justice, which is presently in effect. The only pertinent substantive changes effected by the Code were (1) the extension of court-martial jurisdiction in time of peace to the capital offenses of murder and rape committed within the United States (see Arts. 118, 120; 10 U.S.C. 918, 920), and (2) the modification of the provision calling for delivery of offenders to civil authorities so as to make such delivery discretionary under such regulations as the Secretary concerned may prescribe (Art. 14; 10 U.S.C. 814).

Viewed in its historical perspective, therefore, it seems clear that, as to members of the armed forces, the wartime court-martial power has consistently been regarded as plenary, embracing all offenses. There are strong policy considerations supporting that conclusion. During wartime, the need to maintain control, morale and discipline within the military community is far greater than in times of peace. Undeniably, "[t]he commission of offenses against the civil order manifests qualities of attitude and character equally destructive of military order and safety" (*O'Callahan*

v. *Parker, supra,* 395 U.S. at 281; Harlan, J., dissenting). It best serves the overriding interests of maintaining an efficient and effective wartime fighting force to permit such crimes to be tried by court-martial. See Nelson and Westbrook, *supra,* 54 Minn. L. Rev. at 61–62. Certainly during World War II the military had "a proper concern in keeping its own house in order, by deterring members of the armed forces from engaging in criminal misconduct on or off the base." *O'Callahan* v. *Parker, supra,* 395 U.S. at 282 (Harlan, J., dissenting).

Moreover, court-martial jurisdiction in the present context is responsive to another practical need of the armed forces, that is, the rehabilitation of offenders to return them to useful military service. Soldiers detained by civilian authorities before trial, or imprisoned thereafter, are of little use to the service. By contrast, confinement by the military offers an opportunity for rehabilitation, designed to return the offender to active duty as soon as possible. See Herrod, *The United States Disciplinary Barracks System,* 8 Mil. L. Rev. 35 (1960)." During a war, of course, the restoration of offenders to military functions in this manner takes on added importance.

In view of the above, we believe that the "wartime" factor listed in *Relford* is entitled to considerably

" The court of appeals dismissed this consideration by noting simply that respondent was not returned to active duty (Pet. App. 15, n. 12). It failed to mention, however, that the correctional authorities who had been given responsibility to "rehabilitate" respondent, did not return him to duty because, on the basis of his record during confinement, they concluded that he was not "good material for restoration" (App. 33–34).

more weight than it was assigned by the court of appeals. While we would argue that this factor alone is sufficient to establish court-martial jurisdiction, that need not be decided in this case.[45] For when the wartime aspect is considered along with the additional *Relford* factor here—absence without leave—there is certainly a sufficient military interest to bring respondent's crime of auto theft within the "service connected" category.

As pointed out by the court below (Pet. App. 14), an unauthorized absence is "a more serious breach of military duty and a greater threat to military discipline during wartime than in peacetime." If not dealt with swiftly and firmly so as to discourage servicemen from going AWOL, the result could be large-scale desertion on the eve of battle, perhaps seriously jeopardizing the fighting capabilities of the armed forces at a time when the need to maintain discipline and morale is greatest. For this reason, as Winthrop, *supra* at 608, notes:

> The brief unauthorized absences of soldiers are, in time of peace, most commonly referred for trial to inferior courts by which they are usu-

[45] Several courts have already held that a single *Relford* factor may alone be determinative of court-martial authority, notwithstanding that all the other factors suggest that the crime was not "service connected." Thus the appellate courts have uniformly decided that where the offense did not occur within the United States (factor No. 4), the service-connection test is satisfied, since the alternative to a trial by court-martial is a trial by the foreign country. See *Gallagher* v. *United States*, *supra*; *Bell* v. *Clark*, 437 F.2d 200 (C.A. 4); *Hemphill* v. *Moseley*, 443 F.2d 322 (C.A. 10). And see *United States* v. *Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64.

> ally visited with a small forfeiture of pay or other light sentence. The offense, however, * * * calls for a serious punishment * * * where the offense was committed in time of war, when, in the words of Attorney General Legaré, "the absence falls, in contemplation of law, little short of desertion."

The court of appeals discounted this consideration on the ground that the auto theft offense was a different crime that could not be "[swept] within the jurisdiction" (Pet. App. 14) of the military tribunals. We do not believe, however, that respondent's unauthorized absence from his post and his theft of the automobile can be so easily separated. Rather, the theft may be properly viewed as facilitating his efforts to get away from his post and avoid apprehension by increasing his mobility; thus, it could well be said to have been in furtherance of unlawfully remaining absent without leave. Such circumstances have long been considered relevant to the military offense of AWOL. See Winthrop, *supra,* at 638, listing in this context as significant factors bearing on the offense of unauthorized absence whether the accused took "a horse * * * or such other property * * * as may facilitate a rapid removal * * *," or took "passage on a railway train, steamer, or other conveyance for a distant point * * *."

In these circumstances, we think that respondent's theft of an automobile during his unlawful flight from the service was of sufficient concern to military authorities to support inclusion of that charge along with the AWOL charge in his court-martial. Because

it was committed in wartime, and in furtherance of a military offense that was itself considered to be particularly serious in time of war, the stealing of the car was, we think—unlike the wholly unrelated, peacetime offenses involved in *Gosa* and *Schlomann*—"service connected" within the meaning of *O'Callahan* and *Relford*.[46]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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[46] *United States* v. *Armes*, 19 U.S.C.M.A. 15, 41 C.M.R. 15, holding that the mere fact that a serviceman is improperly absent from base is not, without more, sufficient to establish a service-connection with respect to any offense committed during that absence, is not inconsistent with the result we urge here. There, the unauthorized absence was during peacetime and was thus recognized as a much less serious military offense.

APPENDIX

Instances of Military Punishment for Non-Military Crimes, 1775–1783

There follows a summary of the instances where the military, during the period 1775 through 1783, assumed jurisdiction of apparently non-military criminal offenses committed by military personnel. The General Orders of Washington was used as the source. This summary does not purport to represent all of the courts-martial during this period since courts-martial were also convened by regimental commanders; the General Orders of these commanders are generally unavailable.

WRITINGS OF WASHINGTON

(Examined for the period from Washington's assumption of command at Cambridge in 1775 until the relinquishment of his commission in 1783)

1. H.Q., Cambridge, July 7, 1775 (Vol. 3, p. 317), "A General Court Martial to sit tomorrow, 10 O'Clock A.M. for the Trial of Thomas Raniely, charged with 'stealing'."

2. H.Q., Cambridge, July 29, 1775 (Vol. 3, p. 377). James Foster, Charge: "robbing Dr. Foster, Surgeon of the General Hospital."

3. H.Q., Cambridge, August 21, 1775 (Vol. 3, p. 439). Michael Berry, Charge: "stealing a hat from Capt. Waterman."

4. H.Q., Cambridge, September 24, 1775 (Vol. 3, p. 516). George Hamilton, "soldier in Capt. Dexters Company," Charge: "stealing a blue great coat, the property of Salomon Lanthorp."

5. H.Q., Cambridge, September 28, 1775 (Vol. 3, p. 524). John Hawkins and Robert Higgins, Charge: Theft ("upon appeal from a Regiment Court Martial").

6. H.Q., Cambridge, October 17, 1775 (Vol. 4, p. 35). Lt. Thomas Randell, Charge: "Stabbing a matross in the said regiment."

7. H.Q., New York, May 8, 1776 (Vol. 5, p. 24). Timothy Dawney, Charge: "attempting to stab Joseph Laffin, assaulting John Phipps, and for snapping a loaded musket at Luther Proute."

8. H.Q., New York, May 10, 1776 (Vol. 5, p. 32). Joseph Child of New York Train of Artillery, Charge: "defrauding Christopher Stetson of a dollar," and other charges.

9. H.Q., New York, May 10, 1776 (Vol. 5, p. 32). Zodiac Piper and Thos. Walkins, Charge: "being concern'd in a riot Saturday night."

10. H.Q., New York, May 22, 1776 (Vol. 5, p. 74). Andrew O'Brien, serjeant and William Welch, Corporal, Charge: "assaulting, beating, and dangerously wounding, one William Irvine."

11. H.Q., New York, June 2, 1776 (Vol. 5, p. 95). Hugh Killbreath, of Capt. Roose's Company, Charge: "assaulting, beating and wounding Assa Baker, and David Avery of the Artillery."

12. H.Q., New York, June 16, 1776 (Vol. 5, p. 106). Lt. Van-Hook, Charge: "beating Sally Paterson, an inhabitant of this town, on the head with a stick."

13. H.Q., New York, July 1, 1776 (Vol. 5, p. 209). William Hurly of Capt. Parks Company, Charge: "firing on and wounding without cause one Peter Child a citizen."

14. H.Q., New York, August 11, 1776 (Vol. 5, p. 411). Joseph Martin of Capt. Hurds Company, Charge: "abusing and robbing a woman in the market."

15. H.Q., New York, August 16, 1776 (Vol. 5, p. 441). David Astin of Col. Sillimans Regiment, Charge: "breaking open a store and stealing rum, molasses and fish."

16. H.Q., Morristown, April 7, 1777 (Vol. 7, p. 365). Lt. Carnes, Charge: "converting to his own use the property—viz: A horse and half Johannes, belonging to one Baxter."

17. H.Q., Morristown, April 17, 1777 (Vol. 7, p. 422). Lt. Costigan, Charge: "pressing a horse, the property of John Kidd Esqr. of Bucks County (Pennsylvania) appropriating him to his own use."

18. H.Q., Morristown, May 13, 1777 (Vol. 8, p. 59). Serjt. Hyliard, Serjt. Hallbrook, Corporal Smith, Philip Hendrick, and, Stephen Lee, Charge: "suspected of having robbed the house of Elias Bland."

19. H.Q., Morristown, May 13, 1777 (Vol. 8, p. 60). Joseph Bordon, Charge: "theft."

20. H.Q., Middle-Brook, June 13, 1777 (Vol. 8, p. 245). Alexander Brandon, Charge: horse stealing.

21. H.Q., Clove, July 18, 1777 (Vol. 8, p. 424). John Van Dyck, Charge: stealing three hundred dollars and desertion.

22. H.Q., near the Cross Roads, August 17, 1777 (Vol. 9, p. 88). Capt. Holmes, Charge: "Going into one Palmer's garden, tearing cucumbers from the vines and abusing and striking Dr. Smith."

23. H.Q., Valley Forge, January 28, 1778 (Vol. 10, p. 359). William Dearlove, Charge: "stealing money from Frederick Buzzard." Stephen Rice, Charge: "plundering the inhabitants of the county."

24. H.Q., Valley Forge, March 14, 1778 (Vol. 11, p. 83). Lieutt. Enslin, Charge: "Attempting to commit

sodomy with John Monhort a soldier & swearing to false accounts."

25. H.Q., Valley Forge, March 23, 1778 (Vol. 11, p. 133). Sgt. John Henry Leiders, Charge: "wounding with his sword one Henry Trautcher."

26. H.Q., Valley Forge, April 16, 1778 (Vol. 11, p. 266). Lieutt. Orr, Charge: "conniving with Serjeant Hughes in secreting stolen goods" and other charges.

27. H.Q., Valley Forge, May 29, 1778 (Vol. 11, p. 486). Captain Medaras, Charge: Forgery.

28. H.Q., Valley Forge, June 5, 1778 (Vol. 12, p. 22). Lieutt. McDonald, Charge: "taking two mares and a barrel of carpenter tools on the lines which mares he conveyed away and sold the tools at a private sale."

29. H.Q., Valley Forge, June 13, 1778 (Vol. 12, p. 54). Captain Henderson, Charge: "extorting a sum of money from Alexander Bayard an inhabitant of this state."

30. H.Q., Peramus, July 12, 1778 (Vol. 12, p. 172). Lieutt. West, Charge: "plundering the house of Mrs. Golf."

31. H.Q., White Plains, July 27, 1778 (Vol. 12, p. 242). Mrs. James Davidson, Quarter Master, Charge: "defrauding the soldiers," "embezzling Continental Property and disposing of several Articles belonging to the United States."

32. H.Q., White Plains, August 8, 1778 (Vol. 12, p. 299). John Armstrong, a Private, Charge: "stealing a key."

33. H.Q., White Plains, August 31, 1778 (Vol. 12, p. 375). Captain Ewell, Charge: "embezzling money the property of several soldiers" and "embezzling Cloathing belonging to the Public."

34. H.Q., White Plains, September 9, 1778 (Vol. 12, p. 415). Samuel Bond, Charge: "Picking a lock and breaking into a public store," and stealing.

35. H.Q., Fredericksburgh, October 23, 1778 (Vol. 13, p. 136). Hate-evil Colston of Col. Nixon's Regiment, Charge: "entering the house of Rueben Crosly an inhabitant of Fredericksburgh, by force of arms in company with one more, and taking from thence about three hundred dollars in Continental Money, one Musquet, one pair of plated Shoebuckles and sundry other articles."

36. H.Q., Fredericksburgh, October 23, 1778 (Vol. 13, p. 137). Glover, Goldsmith, and Lamb, soldiers, Charge: "plundering house of Daniel Burch of some Cash, sundry articles of wearing Apparel and Household Furniture." Glover was also charged with "stealing from inhabitants whilst encamped at White Plains & stealing from inhabitants on the march."

37. H.Q., Fredericksburgh, October 23, 1778 (Vol. 13, p. 138). Brown, Herrick, Herring, Walton, Charge: several specifications of breaking and robbing homes.

38. H.Q., Middle Brook, February 11, 1779 (Vol. 14, p. 99). Colo. Craige, Charge: "beating and otherwise illtreating Caleb Brokaw an Inhabitant of this state."

39. H.Q., Middle Brook, February 17, 1779 (Vol. 14, p. 102). Lieutenant William Jenkins, Charge: "embezzling public property."

40. H.Q., Middle Brook, April 22, 1779 (Vol. 14, p. 424). Zimmerman, Serjeant; Gray, Private; Fisher, Farrier; Lankford, Private; and Garner, Private; Charge: "committing sundry robberies on the good people of the United States."

41. H.Q., Middle Brook, May 18, 1779 (Vol. 15, p. 100). Carson, Garnick, Cane, Johnston, Hitchcock, Charge: "breaking into and robbing the house of Mr. Van Noorstrand an inhabitant."

42. H.Q., Camp Middle Brook, May 22, 1779 (Vol.

15, p. 131). Edward Hawkins, soldier, Charge: "attempting to fire on an inhabitant in the night" and other charges.

43. H.Q., Middle Brook, May 27, 1779 (Vol. 15, p. 163). Roger Finney, William Martin, Charge: "housebreaking & robbery."

44. H.Q., Middle Brook, May 30, 1779 (Vol. 15, p. 183). William Mackarun, soldier, Charge: "stealing horseshoes."

45. H.Q., Middle Brook, June 1, 1779 (Vol. 15, p. 207). William Scully, soldier, Charge: "entering forcibly into the house of Robert Dennis and robbing him of sundry goods, also stabbing William Cox with a bayonet."

46. H.Q., Moore's House, November 19, 1779 (Vol. 17, p. 137). Borough and Burges Rickets and Mullen as accessories; Charge: "assaulting the horse by shooting . . . robbing the owner . . . plundering his house."

47. H.Q., Morristown, January 3, 1780 (Vol. 17, p. 345). John Lewis, a soldier, Charge: "Stealing and being drunk on duty."

48. H.Q., Morristown, February 19, 1780 (Vol. 18, p. 34). Lieutenant Porter, Charge: "Unofficer, unsoldierlike, and villainous conduct upon Staten Island viz: robbing and plundering a woman of money."

49. H.Q., Morristown, March 13, 1780 (Vol. 18, p. 110). Bell, Powers, Brown, Justice, soldiers; Charge: "Plundering Mr. Bogart an Inhabitant near Paramus."

50. H.Q., Morristown, May 28, 1780 (Vol. 18, p. 434). Fry, Charge: "stealing beef, candles, rum, and meal."

51. H.Q., Pracaness, July 22, 1780 (Vol. 19, p. 224). Thomas Brown, Charge: "plundering the inhabitants" and "abusing a woman."

52. H.Q., Orangetown, August 14, 1780 (Vol. 19, p. 371). Henry Finn of Colonel Angell's regiment, Charge: "plundering the inhabitants" and "abusing a woman."

53. H.Q., Orangetown, August 20, 1780 (Vol. 19, p. 414). Jesse Hensley and Michael Bourk of the 4th Regiment of Light Dragoons, Charge: "Robbing the house of the widow Sarah Sanford."

54. H.Q., Tean Neck, August 29, 1780 (Vol. 19, p. 467). Philip Lankfitt and Richard Peters, Charge: "Robbing Joseph Wessells of sundry articles in the presence of said Wessell's wife."

55. H.Q., Steenrapia, September 12, 1780 (Vol. 20, p. 33). David Hall, a soldier, Charge: "Plundering an inhabitant of money and plate."

56. H.Q., Orangetown, September 27, 1780 (Vol. 20, p. 96). Rooney, Moore, Miller, Welch, soldiers, Charge: robbery.

57. H.Q., Totowa, October 13, 1780 (Vol. 20, p. 179). David Gamble, Charge: "possession of counterfeit money and desertion."

58. H.Q., New Windsor, February 18, 1781 (Vol. 21, p. 240). Major Reid, Charge: embezzling public property and other charges.

59. H.Q., near York, October 30, 1781 (Vol. 23, p. 301). Gilbert Otter, soldier, Charge: "Not doing his duty as a Centinel and with assisting robbing a french officer's Wagon."

60. H.Q., Newburgh, January 28, 1783 (Vol. 26, p. 73). Cowell, Shea, Jenks, Blake, Creaton, Curtis, Urann, Cook, Woods, Goodrich, Charge: killing a cow, stealing fowls, and stealing geese.

61. H.Q., near York, November 3, 1781 (Vol. 23, p. 320). William Timmans, Charge: "Marauding, and burning the houses of different inhabitants of State of Maryland."

62. H.Q., near York, November 3, 1781 (Vol. 23, p. 322). Abraham Erwin, Charge: "Marauding in one of the barges in Chesapeak bay," and other charges.

63. H.Q., near York, November 3, 1781 (Vol. 23, p. 323). Sgt. Selkirk and James Steel, Charge: "robbing a french officer's wagon at Yorktown."

64. H.Q., Verplanks Point, September 13, 1782 (Vol. 25, p. 155). Ensign Bloodgood, Charge: "taking money out of the drawer in the barroom of the widow Charity Jacobus in a clandestine manner" and failing to clear his reputation among the officers of his regiment when charged with the same.

65. H.Q., Verplanks Point, October 11, 1782 (Vol. 25, p. 252). William Taylor, soldier, Charge: desertion and forgery.

66. H.Q., Newburgh, November 23, 1782 (Vol. 25, p. 368). John Abel, John Cogden and Philip King, soldiers, Charge: "being out of camp at an unreasonable hour and killing an ox belonging to an inhabitant."

67. H.Q., Newburgh, February 21, 1783 (Vol. 26, p. 149). Major Reid, Charge: Defrauding the United States and "embezzling public money."

68. H.Q., Newburgh, March 1, 1783 (Vol. 26, p. 174). Ensign James Sawyer, Charge: assault and robbery of a fellow officer and other charges.

69. H.Q., Friday, March 7, 1783 (Vol. 26, p. 197). Lt. Freeman, Charge: assault upon and theft from a fellow officer.

70. H.Q., Newburgh, April 15, 1783 (Vol. 26, pp. 321, 322). Ensign Herring, Charge: Embezzling public funds and stealing shirts from the common store.

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